

2004 WL 5385606 (Md.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)

Circuit Court of Maryland,

Baltimore City.

Baltimore City County

Judith BERLIN, Plaintiff,

v.

HOME FOR INCURABLES OF BALTIMORE CITY, INC. d/b/a Keswick Multi-Care Center, Defendant.

No. 24-C-03-008985.

November 24, 2004.

Motion to Compel Discovery, Motion for Sanctions Under Rule 2-433, and Request for Expedited Hearing

Respectfully submitted, [Bruce S. Harrison](#), [Randi Klein Hyatt](#), Shawe & Rosenthal, LLP, 20 South Charles Street, 11th Floor, Baltimore, Maryland 21201, 410-752-1040, Counsel for Defendant Keswick.

Defendant, Home for the Incurables of Baltimore City, Inc. dba Keswick Multi-Care Center (Keswick), by counsel and pursuant to the Maryland Rules of Procedure, hereby submits this Motion to Compel Discovery pursuant to Rule 2-432(b)(1)(B) and (E). Defendant also moves for sanctions under Rule 2-433. A certification of counsel under Rule 2-431 is attached to this Motion as Exhibit 1.

In support of this Motion, Defendant Keswick states:

PLAINTIFF'S FAILURE TO ANSWER DEPOSITION QUESTIONS

Attached as Exhibit 2 to this Motion are the various deposition questions that Plaintiff did not answer during her November 12, 2004 deposition, either because her attorney's improperly instructed her not to answer the question and/or because Ms. Berlin refused on her own accord. *See* Exh. 2, Berlin Deposition Tr. 10-19; 85-90, 94-97.

Regarding the questions relating to medications she is currently taking (Tr. 10-19), counsel should be permitted to inquire into a deponent's current physical and mental state to ascertain the deponent's ability to understand and answer questions completely and truthfully and whether there are factors that may impede with such ability.

Regarding the questions asked about her current employer (Tr. 85-90, 94-97), Defendant is entitled to know where Plaintiff currently works, and get details directly from Plaintiff regarding her current employment status. She is seeking lost wages. She alleges wrongful termination from this Defendant. Her behavior and performance at her current employer is relevant for a variety of reasons.

Ms. Berlin would not reveal her wages, the name of her employer and refused generally to discuss her current employment. *Id.* This behavior is contrary to the purpose of the discovery rules generally and in violation of Rule 2-402(a). This line of questioning is reasonably calculated to lead to the discovery of admissible evidence, namely determining her lost wages, determining whether there are issues with her current employment that would bear on her credibility (other than her admission that she lied on her application to get the job in the first place). *See Opposition to Motion for Protective Order*, ¶ 6.

Ms. Berlin was terminated from Keswick for suspected **elder abuse**. Plaintiff's suggestion that Defendant should not be permitted to inquire about her current employment, particularly because it is at another long-term care facility, is ludicrous.

Plaintiff should be compelled to answer questions regarding her current employment, including wages, benefits, supervisor, co-workers, job duties, performance history, and the like.

PLAINTIFF'S FAILURE TO PRODUCE DOCUMENTS

At her deposition, Plaintiff identified several documents that existed but had not been produced in response to Defendant's Request for Production of Documents. When defense counsel questioned Plaintiff regarding the documents, defense counsel asked Plaintiff to provide a copy of the documents to her attorney's so they could be produced in response to the document request that had been served. Neither of Plaintiff's attorneys present at the deposition lodged any objection to the request. *See* Exhibit 3, Tr. 30-32, 44, 52-56.

There are two categories of documents at issue. The first involves a "pencil case box" full of scraps of paper that Ms. Berlin created while she was an employee at Keswick and relate to various matters that arose during her employment. Exh. 3, Tr. 53-57. She did not testify to any facts that would suggest these notes are protected by the attorney-client privilege, the work product doctrine, or some other privilege. Exh. 3, Tr. 52-56. In fact, she testified that it was just her habit to create notes about incidents that stuck out to her because as a nurse "you're trained to document, document, document" and that she did this throughout the course of her employment. Exh. 3, Tr. 54. Notably, Ms. Berlin did not seek to retain any counsel relating to her termination until after two months after she left Keswick. Exh. 3, Tr. 69-70.

The other document at issue involves the notes that Ms. Berlin made the evening of her termination when she got home that night. Exh. 3, Tr. 56. Again, she had not retained counsel at this time and the document she prepared was created by her own doing. Exh. 3, Tr. 56-58. Neither of her attorneys' objected to the request at her deposition to produce the memo. Exh. 3, Tr. 56.

At the conclusion of the first day of Plaintiff's deposition, when defense counsel reminded Plaintiff to bring the above identified documents to her deposition set to resume on November 18, 2004, for the first time, Plaintiff's counsel Diana Urick objected to the production, stating that they did not need to be produced because they were "her work product", they were her own "little notes" that are "private and personal to her." Exh. 3, Tr. 221-24. Defense counsel attempted to explain why the notes would not be subject to an attorney client or work product privilege, but plaintiff's counsel would not here of it. Exh. 3, Tr. 221-27. Although Ms. Urick did state they would review the documents and determine whether they were "relevant," *id.*, to date, Plaintiff's counsel has not contacted defense counsel regarding their review of these documents or whether they will be produced or withheld.

For the reasons stated, Defendant respectfully submits the documents are relevant and that Plaintiff should be compelled to produce them.

THERE WAS A MISREPRESENTATION ABOUT PLAINTIFF'S HEALTH TO AVOID HER DEPOSITION

Ms. Berlin's deposition had been set to start at 9:30 a.m. on November 12, 2004. Prior to her deposition, defense counsel had repeatedly asked plaintiff's counsel to provide a date and time for Ms. Berlin's deposition, but defense counsel had received no response. Defense counsel issued a Notice of Deposition on October 29, 2004, setting the November 12, 2004 deposition, and served copies on both Plaintiff's counsel. *See* Exhibit 4, October 29, 2004 letter.

Two days before the deposition, counsel Urick called defense counsel Hyatt and left a message stating (not asking) that the deposition could not start until 12:00 p.m. Because of this unexpected delay in the start time of the deposition, defense counsel insisted that the parties coordinate the continuation of her deposition on November 12, 2004, at her deposition. *See* Exhibit 5, November 10, 2004 letter. Prior to beginning Plaintiff's deposition on November 12, 2004, counsel coordinated that Ms. Berlin's deposition would continue on November 18, 2004, beginning at noon.

At 7:00 p.m. on November 16, 2004, plaintiff's counsel Bruce Lamb left a message on defense counsel's work voice mail stating that Ms. Berlin had injured herself at work, was going to need to be off of her feet for 10 days, and that her deposition would need to be postponed. In this message, Mr. Lamb offered to provide copies of the medical documentation confirming the nature and scope of the injury. *See* Exhibit 6, November 17, 2004 letter.

Upon retrieving this message the morning of November 17, 2004, defense counsel Hyatt called Mr. Lamb to discuss the matter. Mr. Lamb repeated that he would provide the medical documentation no later than the morning of November 18, 2004. Mr. Lamb did not, however, attempt to coordinate a new date for her deposition, as is directed by Guideline 7(c) of the *Discovery Guidelines of the State Bar*. Mr. Lamb stated he would speak with his client and would get back to defense counsel with proposed dates. He never did, even after defense counsel called again and sent a letter. *See* Exhibit 7, November 22, 2004 Letter. Defense counsel ultimately issued a notice of deposition setting Ms. Berlin's deposition for December 2, 2004.

In any event, on the morning of November 18, 2004, defense counsel received a one page facsimile, sent directly from the Plaintiff, regarding her medical condition. *See* Exhibit 8, Berlin Return To Work Slip. This return to work slip revealed that Plaintiff's "knee pain" which occurred on November 16, 2004, had her out of work for just November 16 and 17, 2004 and *released her to return to work on November 18, 2004*, the date of the deposition, with the only restriction placed relating to walking slowly. *Id.*

Therefore, Plaintiff was not medically prevented from attending her deposition on November 18, 2004 as presented, and certainly was not injured and unavailable for 10 days as presented. Defendant was forced to incur the costs of rescheduling the deposition once again, without any input from plaintiff's counsel, as explained above.

MOTION FOR SANCTIONS¹

Defendant respectfully requests that this Court impose sanctions against Plaintiff and/or Plaintiff's counsel for the repeated violation of the discovery rules during this litigation. Plaintiff's counsel has filed two Motions for Protective Order, without engaging defense counsel in any attempts at resolving the underlying discovery disputes. The first Motion for Protective Order was filed to prevent Defendant from accessing Plaintiff's mental health records despite her allegation of intentional infliction of emotional distress and emotional distress damages. Plaintiff's counsel never communicated with defense counsel on the issue, other than to say he would try and get them. He then filed a Motion for Protective Order without warning or discussion, and without filing a Rule 2-431 certificate. He subsequently withdrew the Motion, but has still failed to produce the mental health records, which are the subject of Defendant's other pending Motion to Compel Discovery.

The second Motion for Protective Order that Plaintiff's counsel filed requested that the Court instruct Defendant not to contact Plaintiff's current employer. Again, Plaintiff's counsel failed to file a Rule 2-431 certificate along with the Motion for Protective Order. Moreover, and more importantly, *Defendant has not even issued any discovery to Plaintiff's current employer over which a protective order could issue*. Further, when defense counsel pointed these facts out to plaintiff's counsel and asked that the Motion for Protective Order be withdrawn, plaintiff's counsel, as usual, simply ignored defense counsel. Therefore, defense counsel was forced to file an Opposition to the Motion for Protective Order, which is also currently pending before this Court.

Plaintiff's counsel has failed to cooperate in coordinating Plaintiff's deposition by ignoring defense counsel's requests to schedule a mutually convenient time for the deposition. Defense counsel has had to unilaterally note the deposition despite repeated requests for availability dates. *See* Exhs. 4 and 7. Plaintiff's counsel have failed to comply with the Rules governing the filing of discovery motions; rebuffed any opportunity to engage in good faith efforts to resolve the discovery disputes that were all created by Plaintiff; instructed Plaintiff not to answer questions without articulating, as is required by the rules, the privilege upon which the instruction was resting; ignored defense counsel's repeated requests to call to discuss the various matters; and has failed to indicate whether the documents that were discovered existing at plaintiff's deposition will be produced.

The final proverbial straws occurred when plaintiff and/or her counsel misrepresented that plaintiff had suffered an injury that would require day two of her deposition be postponed. The medical documentation provided confirmed that Plaintiff did not sustain such an injury. Lastly, when defense counsel called plaintiff's counsel Bruce Lamb in an attempt to discuss these various issues, Mr. Lamb pretended to be someone else after he answered the phone and recognized defense counsel's voice. Defense counsel went through the charade of leaving a message for Mr. Lamb to return her phone call, which he never did as of the date of this filing. *See Opposition to Motion for Protective Order*, ¶ 11.

The discovery rules are broad and comprehensive and scope, and were deliberately designed to be so. *Baltimore Transit Co. v. Mezzanotti*, 227 Md. 8 (1961). The discovery rules are intended to facilitate discovery, and not to stimulate the ingenuity of lawyers to make the pursuit of discovery an obstacle race. *Barnes v. Lednum*, 197 Md. 398 (1951). Unfortunately, plaintiff's counsel has turned Defendant's pursuit of discovery into an obstacle race.

This Court has wide discretion in applying sanctions for failure to adhere to the discovery rules. *Billman v. State of Maryland Deposit Ins. Fund Corp.*, 86 Md. App. 1, 8 (1991). A showing of prejudice is not necessary to support the imposition of sanctions for failure to comply with the discovery rules. *Klupt v. Krongard*, 126 Md. App. 179, 201 (1999). In additions, sanctions may be entered even where the party's failure to comply with discovery is neither willful nor contumacious. *Billman*, 86 Md. App. at 12. In fact, sanctions may be imposed where the party is simply stalling in providing discovery. *Id.* at 13.

Defendant would respectfully suggest that Plaintiff's counsel repeated and deliberate disregard of the discovery rules, the Discovery Guidelines of the State Bar, and general behavior during this litigation should not go unpunished. This is Plaintiff's litigation and the discovery disputes have been created by Plaintiff. Plaintiff's counsel should not be permitted to make issues and then simply ignore Defendant's attempts at resolving the issues.

Defendant would request that this Court permit Defendant the opportunity to file an itemized statement regarding its reasonable costs and attorneys' fees incurred in the preparation and prosecution of this Motion to Compel and related Motions. Defendant would also respectfully request that this Court order such other and further relief as the Court would deem appropriate given Plaintiff's counsel's behavior.

Simultaneously with filing this Motion to Compel Discovery, Defendant has filed a Motion Requesting the Court to Issue an Ex Parte Order to Shorten the Time for Plaintiff to respond to this Motion. The Scheduling Order sets the deadline for resolution of discovery disputes to December 8, 2004. Therefore, Defendant would respectfully request that this Court order a hearing on this Motion to Compel Discovery and Request for Sanctions so that resolution can occur prior to December 8, 2004.

WHEREFORE, for the reasons stated above, Defendant respectfully requests that this Court grant Defendant's Motion to Compel Discovery, Motion for Sanctions, and Request for Expedited Hearing.

Respectfully submitted,

<<signature>>

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Footnotes

- 1 Defense counsel recognizes that a motion for sanctions regarding the alleged discovery violations covered by Rule 2-432(b) (namely, plaintiff's refusal to answer deposition questions and failure to produce responsive documents, will only be appropriate if this Court issues an order compelling such discovery and then Plaintiff fails to comply with said Order).

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